CRIMINAL REVISION APPLICATION NO. 190 OF 1995.
with
Criminal Revision Application No. 191 of 1995.

Date of decision: 11.3.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

M/s.B.M. Gupta & J.B. Dastoor, advocates for applicants.
Mr. Kiran Acharya, advocate for opponent No.1.
Mr. K.P.Raval, A.P.P. for opponent No.2-State.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Coram: R.R.Jain, J.

March 11, 1996.

Oral order (CAV):

These applications arise from Criminal Cases No.1361 of 1992 and 1362 of 1992 on the file of Metropolitan Magistrate (Court No.15), Ahmedabad. In each case the

learned Magistrate was pleased to hold the applicant guilty for commission of offence punishable under Section 138 of the Negotiable Instruments Act and sentenced to undergo simple imprisonment for one month and to pay fine of Rs.25,000/-, in default, to undergo further simple imprisonment for one month. Aggrieved by the judgment and order of the learned Magistrate dated 14.10.1994, the applicant also preferred Criminal Appeals No.41/94 and 42/94. The same were decided by learned Additional City Sessions Judge (Court No.12) Ahmedabad on 1.5.1995, confirming the lower Court's order. Aggrieved by the concurrent finding of both the Courts below, the applicant/original accused has preferred the above Revision Applications.

Since in both cases the parties are same and are also represented by same advocates and involve common question of law and facts, are heard and disposed of by this common order at notice stage on perusal of record and proceeding received from trial Court.

The applicant/original accused is dealing in chemical business and is sole proprietor of Padmavati Sales Corporation whereas the opponent No.1/original complainant is also doing chemical business as sole proprietor in the name of Asim Agencies.

According to the complainant/opponent No.1, in response to an oral order placed on 25.2.1992, goods worth Rs.1,01,500/- was sold and delivered to the applicant/accused vide Invoice No.104/91-92 dated 25.2.1992, Ex.4. The applicant/accused gave cheque No.384270 dated 8.4.1992 drawn on the Co-operative Bank of Ahmedabad, for Rs.1,01,500/- towards payment of said invoice. Unfortunately, on being presented for realisation through opponent No.1's banker, Nutan Nagrik Sahakari Bank Limited, was returned dishonoured and, therefore, following due procedure prescribed under law filed Criminal Case No.1361 of 1992 under Section 138 of Negotiable Instruments Act. Similarly, goods sold and delivered by opponent No.1/original complainant to the applicant vide Invoice No.105/91-92 dated 6.3.1992, Ex.4, for Rs.1,03,156/- the applicant/accused gave cheque No.384258 dated 22.3.1992 drawn on the Co-operative Bank of Ahmedabad, for Rs.1,03,156/- towards payment of said invoice. But the same was also returned dishonoured when presented through Nutan Nagrik Sahakari Bank Limited for realisation and, therefore, the opponent No.1/original complainant filed another Criminal Case No.1362 of 1992 under Section 138 of the Negotiable Instruments Act.

On appreciation of evidence adduced, the learned trial Judge came to conclusion that offence punishable under Section 138 of the Negotiable Instruments Act has been committed by the applicant and thereby convicted as above in both cases.

Admittedly, original complaints have been filed in personal names without impleading the name of the trading concern under which both the parties are trading, that is, their proprietary concern. Mr. Gupta, the learned advocate for the applicants, has vehemently argued that since the cheques are given by applicant proprietary concern in the name of proprietary concern of opponent No.1 and, therefore, if at all any offence is committed, is committed by a proprietary concern against the complainant proprietor concern and as complaint is filed in personal name, same is not maintainable. On this count his arguments are two folded:
(i) the firm has to be indicted and then only the proprietor can be held guilty;
(ii) in absence of impleading proprietary concern as complainant as well as accused, the application would not be maintainable.
It is true that in these matters, the original complainant is doing business in the name of proprietary concern, Asim Agencies, and the accused is also doing business in the name of proprietary concern, Padmavati Sales Corporation. It is true that names of proprietary concern have not been impleaded in the original complaint. But, in my view, this omission does not invalidate maintainability and is not dehors the law. On this point, a reference be made to definition of "person" defined under Section 11 of Indian Penal Code, which says that 'the word "person" includes any Company or Association or body of person, whether incorporated or not'. The word 'person' has also been defined in General Clauses Act under Section 3 (42) which is similar to that of Section 11 of Indian Penal Code. According to this definition, any company or association or body of persons is recognised as legal entity or juridic person. This definition does not include proprietor. Hence a proprietary concern is not a legal entity or juridic person. A proprietary concern is synonym of proprietor. In fact, the proprietor is the person one who does business but for trading convenience business is done in the name of proprietary concern. Thus the proprietary concern is not an independent, legal and juristic entity having legal recognition in the eyes of law. Therefore, neither can initiate any proceedings nor proceedings be initiated against it. In case proprietary concern the proprietor is always an affected person who can either

indict or be indicted. Keeping in mind this legal position, the present proceedings have been rightly initiated by proprietor against accused proprietor. Since proprietary concern has no legal entity question of it being indicted first and then the proprietor does not arise. Interestingly, Mr. Gupta who advances this contention, by his own conduct has negatived, as the present applications have been filed by proprietor against proprietor without impleading trading concerns. If this contention is accepted then alone is sufficient to dismiss both the Revision Applications.

Secondly, a juristic person always functions through human administrator, may be director, manager or partner and the offence committed by such legal entity provides for imprisonment. Then such administrator only has to be convicted to serve out sentence as legal entity cannot be convicted to undergo imprisonment. Of course where only fine is provided, juristic person can be indicted. Taking this view also the contention has no force.

While admitting issuance of disputed cheques, Mr. Gupta, the learned advocate for the applicant/accused vehemently argues that the body of cheques is not written by the drawer and that the cheques were not voluntarily given in discharge of legal debt or liability and thus provisions of Section 138 of the Negotiable Instruments Act are not applicable. On this point, he relies upon decision reported in the case of T.N. Khambti v. M/s.Vinayak Enterprises, 1995 Cri.L.J. 560. Mr. K.P. Raval, learned A.P.P., appearing for the State has invited my attention to cross-examination on behalf of the applicant and statement of accused under Section 313 of Criminal Procedure Code wherein issuance of cheque has been clearly admitted. In my view, this question being purely a question of facts, cannot be raised and appreciated while exercising revisional jurisdiction more particularly when no such contention was ever raised before the trial Court. The only defence advanced before the trial court is that the cheques were given to the complainant as advance payment towards the goods to be delivered in future. Thus, the applicant clearly admitted execution, hence this contention needs no consideration and be rejected. Apart from this fact, no law provides that in case of any negotiable instrument entire body has to be written by maker or drawer only. What is material is signature of drawer or maker and not the body writing hence question of body writing has no significance.

The opponent No.1/complainant has proved by ample

evidence on record that goods were sold and delivered to the applicant in fulfillment of oral order and that cheques were given towards payment of goods sold, therefore, the cheques are for valid consideration and in discharge of liability. Apart from this fact, when any negotiable instrument has been given or executed, a presumption can be raised under Section 118 of the Negotiable Instruments Act that the negotiable instrument was made or drawn for valid consideration. Of course, this is rebuttable assumption but nothing has been produced nor any evidence has been led to rebut this presumption. In this case, other circumstance about valid consideration are so strong that even court need not raise presumption in that regard. The opponent No.1/original complainant has proved sale and deliver of goods by cogent and concrete documentary evidence. The amount mentioned in the cheques exactly tally with the figure of the invoices in question and, therefore, cheques shall be deemed to have been given towards payment of bills vide which goods are sold and delivered and thus have been in discharge of legal dues and liability. Assuming that the cheques are given as advance payment then the cheques would not have been for the exact amount tallying with the amount of invoices. Further more, advance payment is always made prior to the transaction whereas in both these cases the cheques are given after a fortnight of the transaction and date of invoice. The date of placing oral order is not disputed by the applicant. If this be so, what prevented the applicant from making complaint well in advance and inform the opponent No.1/original complainant for non delivery as per order and a consequent request for not sending the cheques for realisation as goods have not been delivered. In absence of any correspondence by applicant with the opponent No.1 in this behalf preceding the notice under Section 138 of the Negotiable Instruments Act, the defence is baseless and is raised in abuse of process of law and deserves to be thrown at the outset. Even assuming that cheques were given as advance payment for goods to be delivered then also non delivery of goods can only amount to breach of agreement and nonetheless the transaction would be void as having been influenced by unlawful means as argued by Mr. Gupta. He further argues that the transaction would be covered by Section 58 of the Negotiable Instruments Act. But in my view, Section 58 of the Act has no application in this case. The Act does not define unlawful means/ consideration hence recourse will have to be taken to various provisions of the Indian Contract Act. Unlawful consideration is defined in Section 23 as being forbidden by law or is such which would defeat the provisions of

any law or is fraudulent or is for immoral or opposed to public policy. Mr. Gupta, the learned advocate for the applicant, has not been able to point out even an iota of evidence by any stretch can bring the case within the purview of Section 23 of the Indian Contract Act. Similarly, unlawful means would also include exercise of force, coercion, etc., but nothing has been pointed out from the record which can bring the case within the purview of various provisions of Indian Contract Act dealing with unlawful means. In this view of facts the judgment rendered in case of T.N. Khambhti (supra) as relied by Mr. Gupta has no application on facts.

A consideration can be past, present or future and, therefore, promise to deliver goods in future can be termed as future consideration and if any cheque is given for future consideration would be for valid consideration and in discharge of legal debts and liabilities and the consideration cannot be said as unlawful.

A contention is also raised that the cheques were never sent for acceptance and, therefore, question of dishonour does not arise. This is again a question purely related to facts. The learned trial Court has on the basis of documents placed before it has come to positive conclusion that cheques were sent for realisation and have been returned with endorsement "refer to drawer" as is evident from Ex.9 in Criminal Case No.1362/92 and Ex.8 in Criminal Case No.1361 of 1992 the memo issued by applicant's bank. Otherwise also this question cannot be agitated in revision application.

One more legal contention has been raised by Mr. Gupta, the learned advocate for the applicant, that no legal notice as contemplated under sub clause (b) to proviso to Section 138 of the Negotiable Instruments Act was ever served upon the applicant hence proceedings are vitiated. From the record it clearly transpires that notice Ex.11 dated 26.4.1992 was sent by Registered Post at the registered address of the applicant/accused in Criminal Case No.1361 of 1992 whereas at Ex.10 in Criminal Case No.1362/92. The notice was sent by Registered Post A.D. and the acknowledgment receipt duly signed is produced on record at Ex.10 in Criminal Case No.1361 of 1992 and at Ex.9 in Criminal Case No.1362/92. Mr. Gupta disputes receipt of the notice saying that the acknowledgment does not bear signature of the applicant. It is true that the signature on the acknowledgment receipt differs from the cheques in question. Here the question is not of signature of addressee but the question is whether was received or reached at the address mentioned. The

correctness of the address mentioned in the cause title of the notice as well as on the acknowledgment is not in dispute. Even the applicant has also written same address in the cause title of the applications. Despatch of notice by Registered post is also not under challenge and, therefore, would be relevant fact and presumption that notice/letter has reached and delivered to the addressee can be raised under Section 16 of the Indian Evidence Act. Since the address is correct and a letter posted in ordinary course reaches to the addressee I have no hesitation in raising presumption that the notices in question did reach to the addressee and have been delivered to the addressee or any authorised person on his behalf and, therefore, this contention also does not find favour to the Court. As regards practice and procedure for service of notice through post and if addresses endeavour to manage to have the notice returned with postal remarks "not available in the house", "House locked", "shop closed", the Apex Court in recent decision in the case of The State of Madhya Pradesh v. Hiralal & Ors. JT 1996 (1) SC 669 has held it to be a valid service on respondent-addressee. In light of this decision, the contention does not hold good as on facts also the prosecution case is on much sound footings and the notice shall be deemed to have been served and much significance can be attributed to difference in signature. A person consciously or unconsciously may put different signatures. In this case the applicant being conscious about anticipated litigation might have scribed different signature with dishonest and deliberate intention of defeating provisions.

Highlighting the fact of difference in signatures on the acknowledgment receipt as well as the cheques Mr. Gupta has argued that the Court cannot be an expert to compare signature as contemplated under Section 73 of the Indian Evidence Act. It is true that the Court cannot be an expert and base its conclusions merely on comparison of signatures by itself. But it can definitely compare the signatures in light of other admitted evidence on record. In this case, I have gone through the judgment and nothing can be found that the Court by becoming expert and comparing signatures has arrived at any particular conclusion. The Court has not made any observation like an expert's opinion. The court has not at all based its finding on such evidence and, therefore, this contention has also no force in the eyes of law. Under law the Court has power to compare signature/ handwriting strengthening its finding based on other cogent material and evidence on record. Therefore, there is nothing wrong if handwritings are compared to strength finding.

Basically, dishonour of cheque is a civil wrong arising out of breach of contract and, therefore, becomes subject matter of civil remedy. However, as held by the Supreme Court in the case of ET&TD Corp.Ltd. v. M/s. Indian Technologists & Eng. (Electronics) Pvt.Ltd., JT 1996 (1) SC 643, object of bringing Section 138 on statute appears to be inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments so that the faith of commercial community in banking operations may not be shaken. Therefore, despite civil remedy, Section 138 is introduced to prevent dishonesty on the part of the drawer of negotiable instrument and abuse thereof. The very scheme of banking operations requires the payee or holder in due course to act upon negotiable instrument presuming that it is in lieu of cash amount. It is in this background that despite civil remedy criminal liability is introduced so as to restore faith of commercial community in banking operations. In case of dishonour the court can raise presumption of dishonest intention and hold criminally liable, a deterrent remedy. That the offence under this Section shall be deemed to have been committed, the moment cheque is dishonoured on being presented for realisation. But, since basically the dispute is of civil nature, the Legislature thought it wise to provide for a safety valve enabling the drawer or maker of instrument to resolve the grievance and get rid off criminal liability by making payment within stipulated period of 15 days from the date of receipt of notice as provided under Section 138 (B) and (C) of the Negotiable Instruments Act. Therefore, issuance of notice is nothing else but a procedure enabling drawer of the instrument to resolve the grievance and get rid off criminal liability. If at all there is any irregularity in service of notice it would be a procedural irregularity and not illegality and shall not vitiate proceedings. Issuance of notice is nothing else but an intimation to the drawer that by dishonour of cheque one becomes subject to criminal liability which can be avoided by making payment.

Thus, on overall consideration of material placed before the Court and oral submissions advanced, I am of the view that the applicant has committed offence punishable under Section 138 of the Negotiable Instruments Act and both the courts below have rightly convicted. I do not find any illegality or error in appreciation of evidence or exercise of jurisdiction dehors the law. Thus, the present revision applications being devoid of merits deserve to be rejected and are hereby rejected

maintaining concurrent finding of both the courts below. Notice in both the applications is discharged.

At this stage, Mr. Gupta, learned advocate for the applicant, orally requests the Court to grant suitable time to the applicant for surrendering before the trial court to serve out sentence. Since the other side has no objection, the applicant is granted time upto to 25.3.1996 to surrender before the trial Court failing which the trial court shall be at liberty to take appropriate steps in accordance with law.